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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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RUSSELL CARTER, et al.

Appellants,

v.

DEPARTMENT OF CHILDREN YOUTH AND FAMILIES,

Respondent.

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**RESPONDENT'S BRIEF**

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## **I. INTRODUCTION**

Appellants Megan and Russell Carter (the Carters) brought an action in superior court to enforce the Department of Children, Youth, and Families' (DCYF) obligation to destroy records relating to screened-out and unfounded reports alleging they abused or neglected their children. Under RCW 26.44.031, DCYF must destroy such records within either three years (screened-out reports) or six years (unfounded findings). DCYF conceded that it had retained records subject to destruction under the statute, and moved the court for an order to destroy the records. The superior court granted DCYF's request.

The Carters also sought money damages from DCYF through their lawsuit in a negligence cause of action. DCYF moved the court for dismissal of the Carters' money damages claims because the statute provided for injunctive relief only. The superior court agreed and declined to imply a remedy that the statute did not provide. The superior court dismissed the Carters' damages action correctly because the Carters cannot prove the

legislature intended for the Court to create a remedy other than those it provided. This Court should affirm.

## **II. STATEMENT OF THE ISSUE**

Whether this Court should imply an additional remedy of money damages to the DCYF records retention statute where the legislature has already provided a remedy for DCYF's failure to timely destroy records concerning screened-out, unfounded or inconclusive reports of child abuse or neglect.

## **III. FACTS**

Megan Carter was the subject of a referral of medical child abuse of her minor son S.C. in 2011. CP 154. Russell Carter is S.C.'s father. CP 2. Child Protective Services (CPS) investigated allegations that S.C. was failing to thrive under his mother's care, he was not eating at home, and his mother wanted him to have a G feeding tube. CP 154. CPS investigated and closed the investigation with an unfounded finding. CP 173.

In 2013, E.C. was born to the Carters. CP 129. Later that year, CPS received a referral that E.C. was failing to thrive,

Mrs. Carter was not giving her the proper mix of baby formula, and possible Munchausen syndrome. CP 175. CPS investigated and closed the investigation with unfounded findings. CP 188.

From December 2017 through May 2018, CPS received five more referrals concerning Mrs. Carter's treatment of E.C. CPS screened out the first two referrals. CP 194-205; CP 207-19. The third alleged that Mrs. Carter did not have the capacity to care for E.C., documented E.C.'s history of hospitalization and current hospitalization at Mary Bridge Hospital for fungal sepsis, kidney infection, aspiration pneumonia and blood stream infection. CP 221. CPS screened in this third referral as "Risk Only." CP 221-32. When a nurse at Mary Bridge referred potential medical child abuse of E.C. by Mrs. Carter in May 2018, CPS screened in this fourth referral. CP 234-45. CPS Supervisor Nerissa Shirley investigated it along with the risk-only referral from March. CP 234. The police took E.C. into protective custody at the hospital. CP 261. The police made a

fifth referral with identical allegations to the nurse's referral, so CPS screened it out. CP 247-58.

On May 11, 2018, DCYF filed a dependency petition for E.C. based on the police's concerns of medical child abuse. CP 271-78. DCYF also requested a shelter care hearing and out-of-home placement for S.C., "due to the risk associated with the alleged medical child abuse and his history of exposure to medical child abuse as a toddler." CP 272. Shirley, who certified the dependency petition for DCYF, informed the court in the petition that she had reviewed information surrounding the 2011 allegations of medical child abuse of S.C. CP 273. Records concerning the 2011 unfounded allegations were more than six years old at this time and should have already been destroyed under RCW 26.44.031.

CPS concluded its investigation of the May 2018 allegations against Mrs. Carter, issuing a founded finding of negligent treatment or maltreatment on May 30, 2018. CP 263-69. Mrs. Carter appealed the founded finding and



contested the dependency petition. CP 281. The court held a 15-day fact finding hearing on the dependency petition and dismissed the dependency as to both parents. CP 127-52; CP 285-87. DCYF administratively changed its founded finding of negligent treatment or maltreatment against Mrs. Carter for the 2018 investigation to unfounded. CP 302.

The Carters filed tort claims with the Office of Risk Management based on DCYF's wrongful disclosure of information concerning the 2011 unfounded report of child abuse or neglect against Megan Carter in the 2018 dependency petition and proceedings. CP 19-71; CP 73-125. The Carters claimed injunctive relief to destroy records under the records retention statute and money damages for alleged emotional distress caused by DCYF's negligence.<sup>1</sup> CP 1-6.

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<sup>1</sup> The Carters filed suit on behalf of their minor children as well. CP 1. They had not filed tort claims on behalf of the children as required by RCW 4.92.110. The Carters conceded this before the trial court and agreed to dismissal of the children's claims. CP 307. The trial court dismissed the claims of the

DCYF moved on summary judgment for an order to destroy the records relating to the 2011 unfounded finding and to dismiss the claims for money damages. CP 291-99. The Carters identified additional records that should be destroyed. CP 305. DCYF conceded that all records concerning seven screened-out or unfounded reports alleging child abuse or neglect should be destroyed. RP 22. The superior court granted DCYF's motion for summary judgment, ordering destruction of records concerning the seven screened-out or unfounded reports and dismissing the claims for money damages. CP 314-16; CP 372-73. The Carters appeal the superior court's dismissal of their claims for money damages. CP 374-77.

#### **IV. ARGUMENT**

The Carters are not entitled to money damages under RCW 26.44.031, the records retention statute for screened-out or unfounded reports of alleged child abuse and neglect. This Court

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children on that basis, and the Carters have not assigned error to that ruling. CP 315; Am. Br. Appellant at 1.

should affirm the superior court's order granting injunctive relief and denying money damages because the superior court granted the Carters the remedy the legislature intended, and nothing further. Whether a court implies a cause of action in a statute is governed by 1) whether the plaintiff is within the class for whose benefit the statute was enacted; 2) whether the legislative intent, explicitly or implicitly, supports creating or denying a remedy; and 3) whether implying a remedy is consistent with the underlying purpose of the legislation. *Bennett v. Hardy*, 113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990). Here, the legislative intent does not support implying money damages as a remedy.

**A. Standard of Review**

The standard of review for an order on summary judgment is de novo. *Enterprise Leasing, Inc. v. City of Tacoma*, 139 Wn.2d 546, 551, 988 P.2d 961 (1999). The appellate court engages in the same inquiry as the superior court, "treating all facts and reasonable inferences from the facts in the light most favorable to the nonmoving party." *Id.* at 551. The appellate

court should affirm an order on summary judgment where the parties do not dispute the material facts and the moving party is entitled to judgment as a matter of law. *Id.* at 556.

The parties do not dispute the facts here. Under RCW 26.44.031(2), DCYF must destroy records concerning screened-out reports and inconclusive or unfounded investigated reports of child abuse or neglect within three years and six years, respectively. RCW 26.44.031(2)(a),(b). DCYF conceded that records related to seven different reports of alleged child abuse or neglect should have been destroyed as of January 7, 2022. CP 297; RP 22.

The superior court granted DCYF's summary judgment motion to direct the agency to destroy those records and dismiss the Carters' monetary damages claims. CP 314-16; CP 372-73. The superior court correctly declined to imply an additional remedy of money damages in light of the specific remedies set forth in RCW 26.44.031. RP 26-27.

**B. Under the *Bennett* Test, the Carters Cannot Show Legislative Intent to Imply the Remedy They Seek**

A court may only imply a remedy under limited circumstances based upon the plain text of a statute in question. This Court should not imply a remedy of money damages for unlawful retention of records in RCW 26.44.031 because the plain language of the statute shows explicit legislative intent to deny that additional remedy.

A court will imply a remedy when the legislature grants a right and fails to provide any remedy for violation of that right. *Bennett*, 113 Wn.2d at 921. In implying a remedy, courts rely on the assumption that the legislature would not enact a statute granting rights to an identifiable class without enabling the class's members to enforce their rights. *Id.* When a plaintiff seeks an implied remedy from the court, that plaintiff bears the burden to prove that the legislature intended to provide for the private remedy they ask the court to imply. *In Re: WPPSS Securities Litig.*, 823 F.2d 1349, 1353 (9th Cir. 1987). The Carters cannot meet that burden here.

**1. The legislature intended to provide only injunctive relief to subjects of screened-out and unfounded reports of alleged child abuse and neglect**

The legislative intent to provide a remedy when DCYF retains records subject to destruction is explicit in the text of the statute. In *Bennett*, the statute at issue made age discrimination “an unfair employment practice” but was silent regarding remedies. *Bennett*, 113 Wn.2d at 919. The *Bennett* court found an implied right of action for plaintiffs alleging violation of the statute because “[w]ithout an implicit creation of a remedy, the statute is meaningless.” *Id.* at 920 (quoting *McNeal v. Allen*, 95 Wn.2d 265, 277, 621 P.2d 1285 (1980) (Brachtenbach, J., dissenting)).

Here, the statute is not silent. It provides:

If the department fails to comply with this section, an individual who is the subject of a report may institute proceedings for injunctive or other appropriate relief *for enforcement of the requirement to purge information*. These proceedings may be instituted in the superior court for the county in which the person resides or, if the person is not then a resident of this state, in the superior court for Thurston County.

RCW 26.44.031(5)(a) (emphasis added). In addition to the injunctive relief, the statute provides for a monetary penalty and attorney fees and costs where the subject of the report is harmed by disclosure to a child-placing agency, a private adoption agency, or a provider licensed under RCW 74.15. RCW 26.44.031(5)(b).<sup>2</sup>

The legislature's intent to provide specific, limited remedies is demonstrated by the plain language of RCW 26.44.031. The legislature provided two sets of remedies in RCW 26.44.031. First, injunctive relief for subjects of screened-out or unfounded reports of child abuse or neglect who seek to enforce DCYF's obligation to destroy records related to those reports. RCW 26.44.031(5)(a). Second, monetary damages for subjects of such reports who are harmed by the disclosure of the information to child-placing agencies private adoption

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<sup>2</sup> The Carters do not claim they were harmed by disclosure to an entity that would entitle them to the relief in RCW 26.44.031(5)(b). Am. Br. Appellant at 4, 6-7.

agencies or other providers licensed under RCW 74.15. RCW 26.44.031(5)(b). The legislative intent to limit a monetary remedy to instances where DCYF not only failed to purge information but also disclosed information to one of the enumerated entities is explicit in the statute.

The legislative intent to provide these remedies – and these remedies only – is not altered by the fact that the legislature passed the bill providing for the remedies 10 years after it originally passed RCW 26.44.031. Courts assume that the legislature is aware of the doctrine of implied statutory causes of action. *Tyner v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 80, 1 P.3d 1148 (2000). Therefore, this Court may properly assume that the legislature was aware of the doctrine of implied statutory causes of action in 2007 when it amended RCW 26.44.031. The legislature's amendment of the records retention statute to expressly provide remedies must be construed as legislative intent that the Court *not* imply its own remedies, as requested by the Carters.



**2. This Court should not turn the records retention statute into a negligence cause of action**

The Carters suggest that this Court imply a cause of action for invasion of privacy or a general tort as a remedy for the records retention statute. Am. Br. Appellant at 22-23. If the Court were to imply any remedy, it would have to be tied to the duty present in the text of the statute. *Tyner*, 141 Wn.2d at 80. In *Tyner*, the court implied a negligent investigation cause of action under RCW 26.44.050, the statute establishing DCYF's duty to investigate reports of alleged child abuse and neglect, where the statute itself was silent as to a creating a remedy. *Id.*

The Court here need not guess regarding the duty in RCW 26.44.031: "[T]he department shall not disclose or maintain information related to reports of child abuse or neglect except as provided in this section or otherwise required by state and federal law." RCW 26.44.031(1). If the court were to imply a negligence cause of action in this case under RCW 26.44.031, the statute requiring timely destruction of records, the cause of action would be negligent maintenance or retention of records,

or negligent disclosure (where DCYF disclosed information to any of the three enumerated entities).

The records retention statute does not support a broad tort for money damages, especially under circumstances like these, where the Carters learned from the May 11, 2018 dependency petition that DCYF had not destroyed records of the 2011 unfounded finding. They could have requested destruction of the records or brought their suit to enforce the requirement to destroy records at that time, before incurring the damages they now claim for the ensuing period of Mrs. Carter's separation from her children while the dependency petition was pending. The superior court also noted, "Megan Carter and Russell Carter certainly had the ability to bring a negligent investigation claim<sup>3</sup> and seek remedies under that, and they have not done so." RP 15.

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<sup>3</sup> Parents injured by DCYF's negligent investigation resulting in harmful separation from their children can pursue money damages through a negligent investigation claim. *Tyner*, 141 Wn.2d at 71.

The Carters’ argument that the injunctive relief provided in RCW 26.44.031(5)(a) does not make them whole does not alter the outcome of the *Bennett* test. The court is still bound to look to the statute for implicit or explicit legislative intent to create or deny the remedy. Here, the superior court looked to the purpose statement in RCW 26.44.010, the records retention statute, and the existing negligent investigation cause of action to conclude the legislature had demonstrated neither implicit nor explicit intent to create a negligence cause of action. RP 26-27. The purposes are to encourage child abuse reporting and make protective services available to children to prevent child abuse and neglect, and if “the safety of the child conflicts with the legal rights of a parent . . . the health and safety interests of the child should prevail.” RCW 26.44.010. This does not convey legislative intent to provide money damages to parents accused of child abuse or neglect when DCYF maintains records concerning unfounded reports beyond a certain time period.

Similarly, the Carter's argument that the underlying purpose of the legislation is consistent with implying an additional remedy does not alter the outcome of the *Bennett* test. Even if they satisfy the third prong of the test, they must prove the requisite legislative intent for the second prong. Since the legislature had the opportunity to add a negligence cause of action to RCW 26.44.031 at the same time it added the injunctive cause of action *and chose not to*, as evidenced by the plain text of the statute, the legislative intent does not support creating an additional remedy. The Carters obtained the remedy the legislature provided them in RCW 26.44.031, and this Court should not imply an additional cause of action. Under the undisputed facts of this case, the Carters do not meet the *Bennett* test, so this Court should affirm the superior court's order granting summary judgment to DCYF.

## **V. CONCLUSION**

Summary judgment denying money damages in this case was proper, since the statute entitled the Carters to injunctive

relief. The Carters cannot prove that the legislature intended for this Court to imply a cause of action for monetary relief. For these reasons, DCYF respectfully requests this Court to affirm summary judgment dismissing the Carters' money damages claim.

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RESPECTFULLY SUBMITTED this 12th day of October, 2022.

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DATED this 12th day of October, 2022, at Olympia,  
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*s/ Heather Mendoza*  
HEATHER MENDOZA

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